The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Germany: Merger Control

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Germany.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control

Country Author: SCHULTE RIESENKAMPFF

The Legal 500

Dr. Christoph Peter, LL.M., Managing Partner

christoph.peter@schulte-lawyers.com

Dr. Kim Manuel Künstner, Partner

kimmanuel.kuenstner@schulte-lawyers.com

1. **Overview**

The provisions relevant for German merger control are contained in the Act Against the Restraint of Competition (ARC) ("Gesetz gegen Wettbewerbsbeschränkungen – GWB"). The main enforcement authority is the Federal Cartel Office (FCO) (Bundeskartellamt). In addition to the FCO, every federal state has its own competition authority. However, merger control is centralized at the FCO.

Mergers and acquisitions require mandatory approval before completion, if certain conditions are met. The assessment comprises a check against turnover-thresholds and

a check for possible exceptions. In addition to the check based on group turnover, the recent (9th June 2017) 9th amendment to the ARC introduced a transaction-value threshold (at EUR 400 Mio.). Both tests will be explained in further detail below.

A transaction may also be caught by German merger control in cases where the JV or the target has no actual or planned business activities in Germany, but the parent companies have significant turnover. German merger control operates with a fictional partial merger of the parent companies ("Fiktion der Teilfusion der Mütter"). In all cases caught by the obligation to notify, closing is prohibited prior to clearance by the FCO.

Parties involved in a transaction are, in any case, the acquirer and the target. If the seller continues to control the target or keeps a shareholding of at least 25 percent post-transaction, the seller remains a company involved and its turnover will be included into the threshold assessment. All parties involved in the merger are responsible to notify the transaction to the FCO, including the seller in cases where assets or shares are sold.

One special aspect of German merger regulation is that the minister of economy may clear a merger in rare cases, even after the FCO has denied clearance ("Ministererlaubnis"). In practice, such exemptions are extremely rare and usually involve political and social considerations, the involvement of unions, competitors, experts and a broader assessment of the influence of the merger on suppliers, customers and the economy as a whole, especially on social aspects like unemployment or structural effects.

2. **Is mandatory notification compulsory or voluntary?**

   Filing is mandatory, if the following prerequisites are met: (i) the transaction qualifies as concentration in the meaning of the ARC, (ii) the turnover of the undertakings concerned exceed the statutory thresholds, (iii) no exception applies and (iv) the transaction is not subject to EU Merger Control.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

   Closing and completion of the transaction are prohibited prior to clearance. It should be

noted, that this applies even in cases where the transaction would not have triggered an obligation to file in the first place, e.g. where filing took place for precaution reasons only.

It is possible to carve out assets within the relevant undertakings in preparation to the transaction, as long as the carve out as such does not trigger an obligation to file, for example by transferring control to a separate legal entity owned by the same undertaking. Stretching out a transaction over time is rarely helpful as transactions including the same parties are treated as one single transaction if they occur within two years.

In principle, it is possible to seek for a derogation to put a concentration into effect prior to filing/clearance. However, in practice this process is rather time-consuming and therefore very rare. It has to be noted that the FCO is very open to clear concentrations within short time, if there are circumstances which require a quick clearance (e.g. in insolvency cases). Therefore, it might be advisable in practice to ask for a quick clearance rather than to apply for a derogation.

4. **What are the conditions of the test for control?**

There are several types of transactions which qualify for a concentration to be notified:

Test 1 – Acquisition of all or a substantial part of the assets of another undertaking: The acquisition of all assets of a company constitutes a concentration pursuant to ARC. If not all assets of an undertaking are acquired, the test is met if the assets acquired represent a competitive position of the seller on the market (e.g. the sale of a dedicated business or an outlet of the seller) and this position is transferred to the acquirer by means of the transaction. The actual means of acquisition, e.g. by merger, acquisition of assets or universal succession, is irrelevant. Obligatory rights to use (e.g. licence rights or alike) are not sufficient for this test but may confer control (see below).

Test 2 – Acquisition of control: The acquisition of direct or indirect control by one or more undertakings over the whole or parts of one or more other companies constitutes a concentration under German merger control. The assessment is very similar to the European merger control regime, since the test also covers both the acquisition of sole or joint control.

Control means the possibility to exercising a decisive influence on the activity of an undertaking. The mere possibility to exert control is sufficient. Control can be acquired by rights, contracts or other means which, individually or jointly, allow the possibility of exercising decisive influence. It has to be noted that control does not require ownership of the assets; mere long-term contractual agreements may be sufficient (e.g. agreements regarding the lease of a business) to confer control. In this context, all factual and legal circumstances have to be taken into account, in particular: ownership or rights in a whole or in part of the assets of the company, rights or contracts which have a decisive influence on the composition, deliberations or decisions of the institutions of the undertaking. The typical case for the acquisition of control is the purchase of a majority shareholding. However, control can also be acquired by minority shareholders (below 25%) if they acquire certain veto rights regarding strategic decision like the appointment of the senior management, the budget and/or the investment decisions of the target company.

The switch from sole control to joint control or vice-versa is also considered a concentration triggering merger control. The situation is unclear to some extent where only the number of companies jointly controlling the target is reduced, but the target will still be jointly controlled after the transaction. According to the publication of the FCO it seems to tend to consider such reduction of the number of companies jointly controlling the target company a change of control requiring a notification.

The object of the acquisition of control can either be a whole undertaking or parts thereof. If the acquirer buys only parts of another company, the test is fulfilled if the part acquired represents a competitive position of the seller on the market (e.g. the sale of a dedicated business or an outlet of the seller). This is equivalent to test No. 1.

In practice, a minority shareholding can confer (sole) control if the minority shareholder holds a secured majority in the annual general meeting of a stock company. Such situation is very common if there is a high degree of free float. In such cases, shareholdings below 50 % may be sufficient to exercise control in an annual general meeting where usually (i.e. within the last three years) the participation in such meetings is below 100 % and it can be assumed that the shareholding of the acquirer will also still constitute a majority in the annual general meeting.

Test 3 – Acquisition of 25 % or 50 %: The acquisition of either (i) 50 % or (ii) 25 % of the

shares or the voting rights in another company constitutes a concentration under German merger control. Shares or voting rights previously held by the acquirer have to be included when assessing this test. Further, shares which are owned by another company but held on behalf of the acquirer are also taken into consideration. This test is of high relevance in practice, since it is one of the tests that covers the acquisition of minority shareholdings. The test is also fulfilled in case of a formation of a new company as long as the shareholding meets the threshold of 25 % or 50 % respectively.

Test 4 – Acquisition of competitively significant influence: This type of concentration covers the acquisition of minority shareholdings of less than 25 % of the shares or voting rights. The actual percentage of shares to be acquired is not decisive in this context so that even the acquisition of very minor shareholdings (e.g. less than 10 %) can trigger merger control. It has to be noted that competitively significant influence is less than control. But it requires – along the acquisition of shares – some plus-factors which confer this competitively significant influence. Such plus factors could be: e.g. the right to appoint a member of the supervisory board, superior knowledge of the market and the business of the target by the acquirer, information rights. In practice, this test usually requires a detailed analysis of the circumstances of the transaction and the competitive relationship between the acquirer and the target.

Test 5 – Creation of a joint venture: Apart from the acquisition of sole or joint control, which is already captured by test No. 2, the German merger control regime provides for another provision dealing with the creation of a joint venture. According to this test, the acquisition of 25 % or more of the shares or voting rights in the target will be considered as (partial) merger of all undertakings which hold 25 % or more of the shares or voting rights in the target company after the transaction. One of the effects of this test is that not only the acquirer and the target but all other undertakings with a shareholding of 25 % or more are considered as undertakings concerned. Therefore, their turnover has to be taken into account as well for the assessment of the financial thresholds.

German merger control covers both full-function and non-full-function JVs. Therefore, the creation of a non-full-function JV can also be notifiable in Germany.

If credit institutions, financial institutions or insurance companies acquire shares in another company for the purpose of reselling them, this does not constitute a merger as long as they do not exercise the voting rights of the shares and if the sale takes place

within one year. This deadline may be extended by the Federal Cartel Office upon request if there is sufficient proof that the sale was unreasonable within the time limit.

5. **What are the conditions on minority interest in your jurisdiction?**

Minority interests are caught by German merger control in certain situations.

First, the acquisition of a minority interest may trigger German merger control if the minority shareholder acquires sole or joint control in the target company. This requires usually that the minority shareholder has certain veto rights regarding strategic decisions (i.e. appointment of the senior management, decisions on the budget or the financial plan). The approach to assume control is comparable to the EU law (see Test 2 above).

Secondly, the acquisition of 25 % or more of the shares or voting rights triggers German merger control (see Test 3 above).

Finally, the acquisition of competitively significant influence may trigger German merger control (see Test 4 above).

6. **What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?**

There are global and national/domestic thresholds. An obligation to file is triggered in two different cases:

Test 1:

- all undertakings concerned in the transaction exceed, added together, a total (global) turnover of EUR 500 million;
- one of the undertakings concerned exceeds a domestic turnover of EUR 25 million and
- another undertaking concerned exceeds a domestic turnover of EUR 5 million.

Test 2:

- all undertakings concerned in the transaction exceed, added together, a total (global) turnover of EUR 500 million;
- domestic turnover of one undertaking concerned in the prior fiscal year exceeded EUR 25 million;
- neither the target nor another undertaking concerned (undertaking from bullet 2 is excluded) have exceeded a turnover of EUR 5 million in Germany;
- the value of total compensation for the transaction exceeds EUR 400 million and
- the target has significant business activities in Germany.

In general, undertakings concerned (i.e. the companies whose turnover has to be taken into account for the assessment of the duty to notify) are the acquirer and the target (or the turnover attributable to the target). Relevant for the calculation in all cases is the consolidated group turnover (without intracompany sales or VAT). The turnover of the seller is usually not relevant for the calculation, unless (i) the seller remains a controlling or jointly controlling shareholder of the target or (ii) maintains a shareholding of 25 % or more in the target after transaction. In such cases, the turnover of the seller has also be taken into account as well for the assessment. The same applies for all shareholders whose shareholding in the target amounts to 25 % or more post-transaction.

In cases in which the direct acquirer of control is itself jointly controlled by two or more undertakings the situation is unclear to some extent. In such cases it has to be analysed in greater detail whether all jointly controlling companies which acquire indirect joint control in the target have to be considered individually as undertakings concerned or whether the turnover of the direct acquirer (including the turnover of its controlling companies) has to be taken into account only. This may have a practical impact if the target's domestic turnover is less than EUR 5 million and the thresholds may only be met in case of an individual consideration of the turnovers of the indirect shareholders. Such situations require a detailed analysis.

Further, the ARC provides for an exemption of the duty to notify if the worldwide consolidated turnover of the seller (including the target) does not exceed EUR 10 million in the last fiscal year.

The thresholds can be exceeded, even if the parties involved do not have overlapping or

competing activities in Germany. Insofar, German merger control regards overlaps as a factor when assessing the potential harmful effects of a transaction only after checking whether the thresholds are exceeded. For this first assessment, it does not matter which parties' turnover exceeds the threshold as long as all parties involved in the transaction exceed all relevant thresholds. When assessing turnover, the total value includes all business activities. It is not limited to the industries affected by a transaction.

The thresholds may be influenced indirectly, as there are multipliers for certain industries which are applied to the turnover before assessing whether the turnover exceeds the threshold (see the following section).

7. **How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

   The relevant timeframe is the last fiscal year of the undertakings in question. VAT and intragroup turnover will not be taken into account.

   For Germany, the allocation rules are similar to those of the European Union. Therefore, the general rule is that turnover should be attributed to the place where the customer is located. For financial institutions, the turnover is to be allocated to the branch or division established which receives this income.

   If undertakings that are active in certain industries are involved in the merger, the actual turnover is multiplied or divided to determine the value used in the threshold test. A multiplier of eight is applied to the turnover of an undertaking that edits, produces, distributes newspapers, distributes or produces broadcasting programs or sells time for advertisement in broadcasting. Turnover resulting from the mere trade of goods (i.e. the products are purchased and sold only) is to be taken into account by 75 % only. The calculation of relevant turnover values in the banking and insurance sector is also different from other industries. The relevant value in this sector is focused on the income side (i.e. financial income and premium income) instead of the usual turnover value.

8. **Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

   The Federal Cartel Office accepts only the average exchange rate of the European

Central Bank.

9. **Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?**

   The rules for merger control apply to joint ventures as well. Forming new joint ventures is covered as well as any significant transfer of assets to an existing JV. The same merger control regime applies to JV and other transactions alike.

   When assessing a transaction involving a joint venture, any company holding 25% of shares or more needs to be taken into account.

   In the framework laid out by the ARC, merger control, prohibition of abuse of dominant position and prohibition of cartels work alongside each other. Therefore, the fact that one applies to a JV does not mean that the other could or would not.

   It does not make a difference if a transaction relates to an existing JV or the creation of a new JV. Neither does German merger control treat full-function and non-full-function JVs different. As long as parent companies and/or the JV exceed the relevant thresholds and the transaction is considered a concentration, the transaction is subject to merger control.

10. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

    A transaction that is initiated outside of the geographical area of the Federal Republic of Germany and that does not affect competition in the country (“reiner Auslandszusammenschluss”) will not trigger an obligation to file.

    German merger control applies to foreign-to-foreign mergers if the merger has a significant (“spürbar”) domestic impact on competition. While the basic criteria, the impact on the market in Germany, is written law, its interpretation is still not completely clear. Furthermore, German courts determine the significance of a specific impact on a case-to-case basis. Based on the decisional practice of the Federal Court of Justice, market shares as low as an addition of 4.4 and 0.14% and 3.5 and 0.23% may constitute

sufficient impact. The necessary domestic activities are, therefore, very low.

If a foreign-to-foreign merger is caught, the thresholds are the same. From a commercial point of view, the risks of not filing usually outweigh the costs by far, when in doubt. Not only may implementing a merger without proper clearance ("gun jumping") lead to significant fines. Under German civil law, the transaction and all agreements made aiming to implement the merger may be found legally void. This causes a significant degree of legal uncertainty, especially as, different from penal law, there is no statute of limitation for this consequence.

11. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable.

12. **Additional information: Jurisdictional Test**

German merger control differs from other regimes insofar as there is no compulsory or common pre-notification phase. In practice, the vast majority of transactions are filed without any pre-notification at all. Nevertheless, it is possible at all times to contact the FCO informally prior to a formal filing of a notification. This may be advisable if the concentration at hand may raise serious concerns, the market definition is unclear or there are doubts whether the concentration is subject to merger control at all. Further, the (limited) scope of information requested by the FCO differs largely from other jurisdictions which tend to follow a more formalistic approach for the merger control notification, regardless of the scope of competitive concerns of the transaction.

13. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

The basic test is whether a merger would result in a significant impediment of competition and whether a dominant market position may result from, or further increase by, the merger. The FCO will take horizontal, vertical, unilateral and coordinated effects of the transaction into account. The test takes a forward-looking approach when

assessing future developments and potential effects on the market. Considerations about the structure of the market are a very important factor as a market share of 40% is sufficient for a rebuttable statutory presumption of a dominant market position in German competition law. The FCO examines a timeframe of up to five years of developments in the market.

German merger control provides further for a de-minimis provision for the substantive test. This de-minimis provision was originally part of the formal assessment but it was recently moved to the substantive test. According to this de-minimis rule, the FCO cannot take any effects into consideration that occur on a market which exists for more than five years and whose market volume in Germany does not exceed EUR 15 million. In practice, the definition of the markets concerned and the total market volume is of high relevance in this context.

In addition, there is also a newly introduced exemption for press companies if the target is a small or medium press company which achieved a significant loss in the last three years prior to the transaction and who could not survive without the transaction. In addition to the aforementioned prerequisites the parties have to prove that there was no other acquirer available.

14. **Are non-competitive factors relevant?**

Non-competition factors are not relevant.

15. **Are there different tests that apply to particular sectors?**

There is no sector-specific test.

16. **Are ancillary restraints covered by the authority’s clearance decision?**

Ancillary restraints may be considered necessary for a certain merger (“Immanenztheorie”). The European Commission Notice on restrictions directly related and necessary to concentrations can provide guidance for German merger control as well. However, the formal clearance of the merger does not necessarily cover ancillary restraints. In most cases, they need to be included in the self-assessment, which is the sole responsibility of every undertaking. A thorough examination of ancillary restraints is

usually advisable as in most cases the FCO explicitly reserves the right to re-examine any agreements made that are not covered by the formal clearance of the merger.

17. **What is the earliest time or stage in the transaction at which a notification can be made?**

There is no limitation by law to early filings as long as the parties are seriously interested in the transaction to be notified. However, it is necessary that the notification contains all the necessary data. Therefore, filing is possible prior to the signing of a transaction as long as the parties can provide sufficient comfort that they have interest in the transaction and the data required for the notification is available.

18. **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

There is no statutory filing deadline apart from the obligation to file prior to implementation. However, as soon as the notice is filed with the FCO, the merger may not be implemented before clearance.

19. **What is the basic timetable for the authority's review?**

Most merger proceedings at the FCO are completed in phase one. Phase one can last a maximum of one month, starting with the date of the submission of the complete notification. If the transaction does not raise competitive concerns, the FCO will clear it within phase 1. Such a decision can't be challenged by third parties. If the FCO does not take any decision within this period, the merger is automatically deemed to have been cleared. After phase one, the FCO may inform the parties that it has entered into phase two ("Hauptprüfungsverfahren"). In phase two, the FCO will investigate the transaction in greater detail. Phase one and two may take up to four months total, starting with the day of the filing of the complete documentation. This timetable is binding as after four months without any decision, the merger is presumed cleared.

If the parties missed to notify the transaction prior to closing, the transaction can be subject to a post-closing notice which contains the same information as the usual merger notification. The FCO will then examine the case at hand and either clear the transaction afterwards or order a de-merger. There is no statutory timetable for the review of such

post-closing notices. In addition, the FCO may impose fines on the parties for disregarding their duties to notify the transaction prior to closing.

20. **Under what circumstances the basic timetable may be extended, reset or frozen?**

    Law does not provide regulations or specify circumstances under which the review timetable may be shortened by the FCO in advance leading to any kind of “fast-track” review. A decision may, of course, be issued before the time runs out if the workload of the FCO permits.

21. **Are there any circumstances in which the review timetable can be shortened?**

    Law does not provide regulations or specify circumstances under which the review timetable may be shortened by the FCO in advance leading to any kind of “fast-track” review. A decision may, of course, be issued before the time runs out if the workload of the FCO permits.

22. **Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**

    All undertakings involved in the merger, as specified above, are responsible for filing. This includes the seller in cases where the seller is also legally considered a undertaking involved in the merger. In practice, the acquirer usually notifies the transaction to the FCO.

23. **What information is required in the filing form?**

    The FCO does not provide a standard form for filings. Practitioners have, however, developed standardized layouts used for most filings that are very similar and based on the layout the FCO uses for its decisions. A standard notification must include at least information about the undertakings involved, the industries these undertakings are active in, turnover (national, Europe, worldwide) or other data replacing turnover, information about market shares including relevant information about the approach

taken to calculate or estimate them, in case of a share deal the percentage of shares acquired and contact information. The scope of information required is – in particular compared to other authorities – very limited.

24. **Which supporting documents, if any, must be filed with the authority?**

There are no requirements to file any supporting documents. It is customary to sign the notification which can be done by a legal representative. Usually the FCO does not require the provision of a power of attorney, unless the FCO enters into Phase 2 of the review.

25. **Is there a filing fee? If so, please specify the amount in local currency.**

There is a filing fee. For standard merger proceedings the fee may amount to a maximum of EUR 50.000 (EUR 100.000 under exceptional circumstances) but is usually between EUR 5000 and 15.000. The actual amount depends in particular on the amount of work linked to the review of the transaction, the size of the companies and the importance of the transaction.

26. **Is there a public announcement that a notification has been filed?**

The FCO regularly publishes all ongoing merger proceedings on its website.

27. **Does the authority seek or invite the views of third parties?**

In German merger control procedure formal and informal participation of third parties in proceedings is possible. Third party participation is not limited to a specific phase or state of the proceedings, as long as they are ongoing.

Informal participation usually means that the FCO contacts selected companies or industry or trade associations, usually by telephone or email, and makes certain inquires. The role of these informal participants is merely passive. Naturally, the FCO will also accept voluntary information offered actively. The FCO decides about informal participation on a case-to-case basis.

Inquiries may also be made formally. When it finds this to be necessary, the FCO will

issue a formal request for information (“Auskunftsverlangen”). Formal requests for information may ultimately be enforced by the FCO.

If another company decides to take part formally, it may be formally summoned as an interested party. To be summoned to ongoing proceedings, a formal request is required which should outline the specific interest of the applicant to be part to the proceedings. Interested parties receive more information about the proceedings and may make certain formal requests. In addition, the decisions of the FCO may only be challenged by parties that were formally party to the proceedings. For formal participation, legal representation is usually advisable.

28. **What information may be published by the authority or made available to third parties?**

The FCO regularly publishes its decisions (i.e. any decision in phase 2 only) in a partly redacted version (e.g. no business secrets or personal information included) on its website. Beyond that, the FCO will not publish the parties’ notification or any supporting documents or other submissions without the consent of the parties. In practice, parties receive a version of the decision prior to publication on the website, especially in cases where (potentially) confidential information (business secrets, personal information) is mentioned in the non-redacted version. There is, however, no direct legal obligation forcing the FCO to make it available.

29. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

The German FCO is a member of the European Competition Network (ECN) and regularly exchanges relevant information with authorities in other member states. The FCO may exchange any information relevant for the application of Art. 101, 102 TFEU with other members as well as with the European Commission. There is no limitation to the exchange of information within the ECN.

It is unknown whether there is a list or comparable collection of cooperation agreements of the FCO with competition authorities outside of the ECN. There are no known official agreements. The FCO does cooperate within the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD) and the

United Nations Conference on Trade and Development (UNCTAD). Exchange of information may take place on a case-to-case basis.

However, the FCO may only exchange information originating from merger proceedings with competition authorities outside of the ECN with the prior consent of the undertaking that submitted the information. There is no legal consequence for refusing consent.

30. **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

The FCO is not limited by law as to what remedy may be appropriate. German competition law, in general, doesn't allow behavioural remedies in a sense of supervision of future market behaviour. The FCO is, therefore, more limited to structural remedies understood in a broad sense, which may occur as conditions ("Bedingung") or requirements ("Auflage"). While conditions affect the validity of the clearance depending on certain events, requirements can be separately enforced by the FCO (e.g. by fining undertakings for non-compliance). A conditional clearance with a contingent condition means that the transaction may not be implemented until the conditions are met. A conditional clearance with a resolutive condition means that the clearance becomes invalid if the conditions are met.

Recently, the FCO has shifted its practice and rarely uses requirements but mainly contingent conditions. A contingent condition requiring a form of divestment is the most frequent choice. The FCO may, based on facts of the case at hand, accept a number of remedies including but not limited to licensing, provisioning of access to raw materials or facilities, installation of a trustee for divestment purposes or termination or change of certain contracts.

31. **What procedure applies in the event that remedies are required in order to secure clearance?**

It should be noted that the initiative for remedies lies with the parties, not the FCO. While there are no sharp lines in practice, commentators argue that the FCO should not suggest or demand a certain way in which undertakings might alter the structure of a transaction in order to receive clearance. It follows that the parties should suggest

remedies, as the FCO is under no obligation to do so but may just outright deny clearance. There is no specific “deadline” for suggestions. In practice, the FCO may suggest, in bilateral talks, what kind of remedy might be sufficient for it to clear an envisioned transaction. If such indication is given, the parties should examine the reasons given carefully and may then suggest a remedy. The FCO will then assess whether the suggested remedy is sufficient to countervail or avoid the negative effects on competition. The assessment by the FCO is usually very thorough, as the FCO must clear a transaction without any additional leeway if the remedies are sufficient to resolve remaining competition concerns.

One important consequence of this procedure is that the FCO won’t give a conditional clearance where the parties did not suggest one. Conditional clearance will only be given where the parties have suggested a remedy beforehand. Otherwise, the FCO will decide only between clearing a transaction and not clearing it.

32. **What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

By law, a late notification and failure to notify at all are not treated differently. As explained above, it depends what consequences may result from breach of an applicable prohibition on closing. At this point, a case of closing without valid clearance will be treated similarly to closing with no clearance at all.

Violations of prohibitions that may be enforced separately will result in fines. Undertakings implementing a transaction before clearance or without valid clearance may be fined up to 10% of the group turnover of the last fiscal year. The fact that an attempt to acquire valid clearance was made may be taken into consideration when calculating possible fines as well as in court proceedings in civil courts should such proceedings take place as a consequence.

33. **What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?**

The FCO usually doesn’t impose fines in case of incomplete filings if caused by negligence only. However, incomplete filings lead to extended procedures as the clock does not start to run until the filing is complete. It is much more likely that the FCO will

impose fines if information is found to be intentionally misleading.

34. **Can the authority's decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

The appeal procedure in Germany is centralized. Decisions of the FCO are subject to appeal to the Higher Regional Court (Oberlandesgericht) of Düsseldorf. The appeal must be launched within one month, running from the day the recipient has received the decision he wants to challenge. It should be noted that the appeal, notwithstanding the fact that the Higher Regional Court will decide, can be filed with both the FCO or the court. The time appeals take varies greatly, depending on the complexity of the case. A total duration of 6 to twelve months is common, but longer and shorter court proceedings may occur.

Decisions in phase 1 cannot be challenged at all.

35. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

The FCO has very recently refused to clear a merger between two food retailers. The merger was then cleared by the minister of economy. The decision of the FCO followed an intense investigation into the abuse of dominant market position in the food retail market.

The FCO also recently published its final report about the sector inquiry dealing with ready-mixed concrete and cement. While the sector inquiry mainly focused on horizontal and vertical coordination, it is likely that there will be significant consequences for the industry. The FCO has indicated that it will not shy back from unbundling joint ventures where undertakings won't take sufficient steps to reduce concentration and overlaps.

The 9th amendment to the ARC has, amongst numerous other changes, introduced the concept of transaction-value into German competition law to catch mergers in new and evolving markets. According to the considerations of the government, it was specifically intended to include mergers of low turnover companies in digital markets into merger control. While not decisions based on merger control, some recent decisions dealing with

internet-platforms have further proven that the FCO has a set a priority in controlling activities in digital markets.

The FCO and the courts will have to interpret the numerous additions and changes to the ARC introduced by the 9th amendment, among them the new transaction-value mechanism. A focus of developments in German competition law will, therefore, likely lie in the interpretation and application of the law. It is also very likely that the FCO will further intensify its recent efforts to further develop the application of competition law on digital markets.

36. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

With the recent 9th amendment to the ARC, there are no current plans for reforms of the merger control regime.